Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

No. 94-752

In the Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN BANKERS ASSOCIATION, ET AL., PETITIONERS

v.

FRANK J. KELLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether Congress has authorized the Environmental Protection Agency to promulgate regulations addressing the potential liability of secured creditors under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 1a-25a) is reported at 15 F.3d 1100. The opinion of the court of appeals denying a petition for rehearing (Pet. App. 26a-35a) is reported at 25 F.3d 1088.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1994. A petition for rehearing was denied on June 14, 1994 (Pet. App. 37a). On August 26, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 27, 1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision that invalidates the Environmental Protection Agency's (EPA's) regulations addressing the potential liability of secured creditors under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The EPA promulgated its lender liability regulations in April 1992, after extensive notice and comment proceedings. See 57 Fed. Reg. 18,344 (1992); 40 C.F.R. 300.1100. The State of Michigan and the Chemical Manufacturers Association (CMA) filed petitions for review of those regulations in the United States Court of Appeals for the District of Columbia Circuit in accordance with CERCLA's provisions for judicial review. See CERCLA § 113(a)(1), 42 U.S.C. 9613(a)(1). The court of appeals invalidated the regulations, concluding that Congress did not authorize the EPA to issue rules concerning lender liability that would control actions in which the United States is not a party.

1. Congress enacted CERCLA in 1980 to address the cleanup of hazardous waste sites. The statute empowers the President to exercise a variety of mechanisms to prevent or remedy the release of hazardous substances into the environment. The President has delegated most of his authority to administer CERCLA to the EPA. See CERCLA § 115, 42 U.S.C. 9615; Exec. Order No. 12,580, 3 C.F.R. 193 (1987) . Among its delegated powers, the EPA has authority to promulgate a National Contingency Plan (NCP) "to reflect and effectuate the responsibilities and powers created by this chapter." CERCLA § 105(a), 42 U.S.C. 9605(a). The EPA also possesses authority "to promulgate any regulations necessary to carry out the provisions of this sub-

chapter." CERCLA § 115, 42 U.S.C. 9615. See Exec. Order No. 12,580, 3 C.F.R. 193 (1987).[1]

As this Court has noted, "CERCLA both provides a mechanism for cleaning up hazardous-waste sites * * * and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989). The EPA may take direct "response" actions to abate any actual or threatened release of any hazardous substance, CERCLA § 104(a)(1), 42 U.S.C. 9604(a)(1), and it may bring cost recovery actions against identified categories of responsible parties to obtain reimbursement of its expenditures, CERCLA § 107(a), 42 U.S.C. 9607(a). Responsible private parties may also undertake their own response actions and seek contribution for any "necessary costs of response incurred," CERCLA § 107(a)(4)(B), 42 U.S.C. 9607(a)(4)(B), from "any other person who is liable or potentially liable," CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1). See *Key Tronic Corp.* v. *United States*, 114 S. Ct. 1960 (1994).

The EPA also may issue administrative orders directing responsible parties to undertake response actions as necessary to protect public health and welfare and the environment. CERCLA § 106(a), 42 U.S.C. 9606(a). Parties who receive and comply with such orders may be entitled to reimbursement of their reasonable costs from the government's cleanup fund (the so-called Superfund), but only if they demonstrate that they are not liable parties under CERCLA Section 107(a), 42 U.S.C. 9607(a), or if they establish on the basis of the administrative record that the order was arbitrary and

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[1] See *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1584 (1992); *Eagle-Picher Indus., Inc.* v. *United States EPA*, 759 F.2d 905, 909 n.9 (D.C. Cir. 1985).

capricious or contrary to law. CERCLA § 106(b)(2)(D), 42 U.S.C. 9606(b)(2)(D).

CERCLA Section 107(a) identifies four broad classes of liable parties including, as pertinent here, the owners and operators of hazardous substance facilities. 42 U.S.C. 9607(a). The statute also provides a definition of the term "owner or operator" that demarks general limits on the reach of CERCLA liability. CERCLA Section 101(20) provides, among other things, a secured creditor exemption, which states that the term "owner or operator" does not include

> a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A). The EPA promulgated its lender liability regulations to clarify the reach of that provision.

2. During the EPA's early administration of CERCLA, the secured creditor exemption was not a major subject of controversy. By 1990, however, questions had arisen over the scope of the exemption. Lenders became concerned about what types of "participati[on] in the management" would amount to ownership or operation of a facility and whether they could exercise rights of foreclosure without incurring liability.

The Eleventh Circuit's decision in *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550 (1990), cert. denied, 498 U.S. 1046 (1991), exacerbated the uncertainty. That decision recognized that Congress intended the exemption to protect the commercial practices of secured creditors "in their normal course of business," 901 F.2d at 1556, but nevertheless suggested in dicta that

"a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Id.* at 1558.

The EPA responded to that uncertainty by initiating a rulemaking proceeding to clarify the scope of the secured creditor exemption. See 57 Fed. Reg. 18,344 (1992). The resulting rule sets out the agency's understanding of the constituent terms of the exemption—including the terms "indicia of ownership," "primarily to protect a security interest," and "participating in the management of a vessel or facility"—and specifies permissible actions that a lender may undertake without losing the exemption. 57 Fed. Reg. 18,382-18,385 (1992); 40 C.F.R. 300.1100.

3. Two affected parties, the State of Michigan and the CMA, petitioned for review of the EPA's lender liability rule. A divided panel of the District of Columbia Circuit granted the petition and vacated the rule. Pet. App. 1a-16a. The court characterized the issue as "whether the EPA can, by regulation, define and limit a party's liability under section 107" of CERCLA. Pet. App. 8a. It concluded that Congress did not intend the "EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants." *Id.* at 12a. The court reasoned that Congress, through provision of a private right of action, "designated the courts and not EPA as the adjudicator of the scope of CERCLA liability." *Id.* at 13a, citing *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990).[2]

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[2] The court did not question that "the regulation could be sustained as a policy statement that would guide EPA's enforcement proceedings across the country." Pet. App. 15a. It noted, however, that the "EPA has not asked that its regulation be so

Chief Judge Mikva dissented. Pet. App. 17a-25a. He concluded that Congress "implicitly delegated authority to the EPA to define which parties fell within the statute's regulatory regime." *Id.* at 20a. He reasoned that the EPA was obligated to construe the CERCLA term "owner or operator" to administer CERCLA's notification and response authorities. Pet. App. 21a. See CERCLA §§ 103(c) and (d), 104(a)(1), 106, 42 U.S.C. 9603(c) and (d), 9604(a)(1), 9606. In Chief Judge Mikva's view, "determinations of causality rest ultimately with the courts while most other determinations, including who falls within the scope of CERCLA's statutory coverage, are for the EPA and are entitled to *Chevron* deference." Pet. App. 24a. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Chief Judge Mikva distinguished this Court's *Adams Fruit* decision on the basis that the EPA must construe the statutory terms defined in the rule in the course of administering the statute. Pet. App. 24a-25a.

The government filed a petition for rehearing, and the court of appeals panel issued an order and opinion denying the petition. Pet. App. 26a-35a, 37a. The court emphasized that the resolution of the case depended upon the history of the regulation actually promulgated by EPA and the precise statutory provisions involved. *Id.* at 28a-33a. The court acknowledged that Congress may have delegated "substantive authority to interpret statutory terms to an agency in the mixed position that EPA occupies under CERCLA," and that in other parts of the statute, "[i]t may well have done so" "regardless of the private rights of action." *Id.* at 34a. But the court

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regarded" and concluded that "the proper course is to vacate the rule and leave EPA free to take whatever steps it thinks appropriate." *Ibid.*

concluded that the EPA's regulation here impermissibly addressed a question of the scope of CERCLA liability that Congress reserved for the courts. *Id.* at 35a. Chief Judge Mikva dissented from the order denying the petition for rehearing. *Id.* at 28a n.*, 37a.

DISCUSSION

Petitioners contend that this Court should review the court of appeals' decision because the validity of the EPA's lender liability rule is a matter of national importance and because the court of appeals misapplied this Court's decision in *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), in a way that undermines the Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The federal respondents have not independently petitioned for a writ of certiorari in this case, but will defend the EPA's regulation if the Court grants the petitioners' request for review.

1. Petitioners argue (Pet. 9-11) that the court of appeals' invalidation of the EPA's lender liability rule has revived the prior confusion over lender liability under CERCLA and will distort normal lending practices, deter lenders from making beneficial loans, and restrict the availability of credit for businesses that are subject to environmental regulation. We agree that the court of appeals' decision may have those effects. The EPA's regulation, which sets out that agency's expert interpretation of CERCLA's imprecise terms, provided authoritative clarification of the scope of the statute's secured creditor exemption. If the financial services industry must now make loans in the absence of that clarification, lenders concerned by the prospect of future potential liability may respond by denying loans

or increasing the cost of credit to important sectors of the national economy.

Although this case has national importance, that factor by itself does not normally provide a sufficient basis for Supreme Court review. This Court typically does not address a question of statutory construction in the absence of a clear conflict among the courts of appeals. Sup. Ct. R. 10. The precise question decided by the court of appeals—whether CERCLA authorizes the EPA to promulgate a lender liability rule—is a matter of first impression. To be sure, no conflict among the courts of appeals is possible, because Congress has given the D.C. Circuit exclusive authority to review regulations promulgated under CERCLA. See CERCLA § 113(a), 42 U.S.C. 9613(a). But the absence of a square conflict nevertheless diminishes the need for this Court's intervention insofar as the lower court has not imposed a legal standard that is applied differently elsewhere in the country.[3]

Furthermore, the practical importance of the court of appeals' ruling to commercial lending may be shortlived. Notwithstanding the dicta in the Eleventh Circuit's *Fleet Factors* decision suggesting that lenders might incur CERCLA liability based on their mere ability to affect a debtor's hazardous waste activities, courts have actually imposed liability on lenders only in unusual circumstances.[4] Since the promulgation of the EPA

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[3] Cf. R. Stern et al., *Supreme Court Practice* 168 (7th ed. 1993) ("One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals.").

[4] See, *e.g.*, *United States* v. *Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986) (property held as an investment for four years after purchase at foreclosure sale); *United States* v. *Fleet Factors Corp.*, 821 F. Supp. 707, 718-720 (S.D. Ga. 1993)

regulation, the lower federal courts have found that the EPA's construction of the secured creditor exemption is either consistent with, or compelled by, the statutory language.[5] Thus, the EPA's interpretation of the statute may ultimately receive broad judicial acceptance, notwithstanding the court of appeals' conclusion that the rule itself was unauthorized. Additionally, the current confusion may be resolved through congressional action. See Pet. App. 16a. Congress recently considered, but failed to enact, proposed CERCLA legislation that would have addressed the question of lender liability. See H.R. 3800, 103d Cong. 2d Sess. (1994); S. 1834, 103d Cong., 2d Sess. (1994). That matter is likely to be the subject of renewed legislative attention in the next Congress.

Petitioners also suggest (Pet. 11-13) that the decision has national importance because the "EPA's rulemaking authority under CERCLA is seriously eroded by the court of appeals' erroneous ruling." Petitioners contend that the lower court's theory leaves the EPA "powerless to issue rules clarifying any issue that affects CERCLA 'liability.'" Pet. 11. The court of appeals' opinion denying rehearing indicates, however, that the court's decision was not intended to have that sweeping effect. The court specifically acknowledged that "each section of the statute [must] be analyzed separately to determine

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(mishandling of hazardous substances by contractors in connection with foreclosure). In contrast, more usual actions by lenders have not resulted in the imposition of liability. See, *e.g.*, *In re Bergsoe Metal Corp.*, 910 F.2d 668 (3th Cir. 1990); *United States* v. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

[5] See *Northeast Doran, Inc.* v. *Key Bank of Maine*, 15 F.3d 1 (1st Cir. 1994); *Waterville Indus., Inc.* v. *Finance Auth. of Maine*, 984 F.2d 549, 553 (1st Cir. 1993); *United States* v. *McLamb*, 5 F.3d 69, 73 (4th Cir. 1993); *Ashland Oil, Inc.* v. *Sonford Products Corp.*, 810 F. Supp. 1057, 1060 (D. Minn. 1993).

whether EPA can assert authority to interpret, with *Chevron* deference, substantive terms." Pet. App. 35a. Hence, notwithstanding the court's broad pronouncements in its initial decision, the court's holding here may be limited to the circumstances surrounding this particular rule.[6]

2. Petitioners also contend (Pet. 13-17) that the court of appeals' application of this Court's decision in *Adams Fruit Co.* v. *Barrett*, *supra*, raises an important and recurring question about the scope of the *Chevron* doctrine. They explain that *Adams Fruit* established the limited principle that an agency cannot validly issue regulations interpreting privately enforceable statutes that the agency lacks authority to administer. See 494 U.S. at 649-651. Petitioners argue that "[t]he court below extrapolated *Adams Fruit* far beyond this, to suggest that *Chevron* deference disappears whenever an agency issues a rule in the context of a dual government/private enforcement scheme." Pet. 14.

We agree that the court of appeals has over-extended the *Adams Fruit* decision in a way that creates tension with established principles of administrative law. As

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[6] The courts of appeals have given *Chevron* deference to other EPA regulations interpreting CERCLA provisions. For example, in *Wilshire Westwood Assocs.* v. *Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989), the court of appeals deferred to the EPA's interpretation of the definition of a "hazardous substance," which contains a petroleum exclusion. See CERCLA § 101(14), 42 U.S.C. 9601(14). The agency was required to construe that provision to administer its response authorities under CERCLA, see CERCLA § 104, 42 U.S.C. 9604, and the court saw no reason for the statutory term to have a different meaning in private litigation. 881 F.2d at 810. See also, *e.g.*, *Ohio* v. *United States EPA*, 997 F.2d 1520 (D.C. Cir. 1993); *Ohio* v. *United States EPA*, 838 F.2d 1325 (D.C. Cir. 1988).

Chevron makes clear, an agency charged with the administration of a congressionally created program may formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843. The agency's power to fill those statutory gaps is not diminished by the fact that the agency and private parties may seek judicial assistance in enforcing the statute.[7]

Petitioners point out that the Eighth Circuit recently relied on *Adams Fruit* in refusing to give *Chevron* deference to the EPA's interpretation of language in Section 106(b)(2) of CERCLA. See *Dico, Inc.* v. *Diamond*, 35 F.3d 348 (1994).[8] The Eighth Circuit's application of *Adams Fruit* may well have an unsettling effect on established *Chevron* principles. Nevertheless, the Eighth Circuit's decision has not given rise to an irreconcilable conflict among the courts of appeals on the relationship between *Adams Fruit* and *Chevron*. Given the absence of a clear conflict, this Court would normally await further rulings on the matter by other courts of appeals before granting review.

3. Although the federal respondents have not petitioned this Court for a writ of certiorari in this case,

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[7] See, *e.g.*, *K mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988) (giving deference to the Treasury Department's interpretation of a statute imposing judicially enforceable import prohibitions, 19 U.S.C. 1526); *United States* v. *Boyle*, 469 U.S. 241, 246 n.4 (1985) (giving deference to the Internal Revenue Service's interpretation of a statute imposing judicially enforceable penalties for late filing).

[8] The Eighth Circuit also relied on the court of appeals' decision in this case, notwithstanding the D.C. Circuit's prior ruling that the EPA's interpretation of Section 106(b)(2) is entitled to *Chevron* deference. See *Wagner Seed Co.* v. *Bush*, 946 F.2d 918 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1584 (1992).

we will defend the EPA's lender liability rule in the event the Court grants review. The EPA is empowered to interpret CERCLA in accordance with the statute's explicit delegation of rulemaking authority, CERCLA § 115, 42 U.S.C. 9615. See Exec. Order No. 12,580, 3 C.F.R. 193 (1987). As the dissent below correctly explains (Pet. App. 19a-23a), the EPA must interpret the CERCLA term "owner or operator" to carry out the provisions of CERCLA in a variety of different administrative contexts. See, *e.g.*, CERCLA § 103(c) and (d), 42 U.S.C. 9603(c) and (d) (reporting requirements imposed on owners or operators); CERCLA § 104(a)(1), 42 U.S.C. 9604(a)(1) (determination that response will be properly done by owner or operator); CERCLA § 106(a), 42 U.S.C. 9606(a) (issuance of clean-up orders). The EPA accordingly has authority to construe the term "owner or operator" and the secured creditor exemption contained in the statutory definition of that term. See CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A). The EPA's lender liability rule provides a reasonable interpretation of that statutory provision that is entitled to *Chevron* deference.

CONCLUSION

If the petition for a writ of certiorari is granted, the federal respondents will defend the validity of the EPA's lender liability rule.

Respectfully submitted.

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NOVEMBER 1994